No. 11382

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM SHUBIN, FREDERICK ALEXANDER SHUBIN and JACK L. KISSEL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Jurisdiction.

Appellants were indicted under the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 901 *et seq.*), and the regulations promulgated under that Act, as well as Section 37 of the Criminal Code (18 U. S. C. §88). The District Court had jurisdiction under Sections 24 and 340 of the Judicial Code (28 U. S. C. 41(2) and 18 U. S. C. 546) and Section 205(c) of the Emergency Price Control Act of 1942 (50 U. S. C. A. 925(c). The offenses charged were committed in the Southern District of California [R. 3 ff.].[1] Judgments were entered on July 5, 1946 [R. 56-63]. Notice of appeal filed on July 9, 1946 [R. 64-65]. This Court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. 225).

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[1]References herein preceded by "R" are to the printed record on appeal, while the references preceded by "A. B." are to the appellants' brief.

Statutes and Regulations Involved.

Section 37 of the Criminal Code, 18 U. S. C. 88, provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Section 4 of the Emergency Price Control Act of 1942 (50 U. S. C. App. 904) provides in part as follows:

> "It shall be unlawful, regardless of any contract, agreement . . . or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, . . . or otherwise do or omit to do any act, in violation of any regulation or order . . . of any price schedule effective in accordance with the provisions of this Act."

Section 202(b) of the Emergency Price Control Act of 1942 (50 U. S. C. A. 922(b)) provides as follows:

> "The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, . . . to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, . . ."

Section 205(b) of the Emergency Price Control Act of 1942 (50 U. S. C. A. 925) provides in part as follows:

> "Enforcement.
>
> * * * * * * * *
>
> "(b) Any person who willfully violates any provision of section 4 of this Act [section 904 of this Ap-

pendix], and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 [sections 902 or 922 of this Appendix], shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than . . . one year . . . or to both such fine and imprisonment. . . ."

Maximum Price Regulations 148, 169 and 239 are the Regulations of the Office of Price Administration making detailed provisions with reference to specific products of the type involved in this case. These Regulations, in so far as they apply to this case, are set forth in the Appendix to this brief.

Statement of the Case.

On March 11, 1946, the appellants were indicted in the United States District Court for the Southern District of California, Central Division, in 40 counts. Count 1 alleged that the appellants conspired, in violation of 18 U. S. C. §88, to commit certain acts prohibited by the Emergency Price Control Act of 1942, and Maximum Price Regulations 148, 169 and 239, issued under that Act [R. 3-8]. Counts 2 to 15, inclusive, and 23 to 33, inclusive, each in substance charged that the appellants made a sale of certain, specified meat items for a price per pound in excess of the maximum price permitted by the Emergency Price Control Act of 1942, and the Regulations issued under it [R. 9-18, incl., 23, 33]. Counts 16 to 22, inclusive, charged that appellants made a false entry in a document required to be kept under the provisions of the

Emergency Price Control Act, and the Regulations[2] [R. 18-23, incl.].

On March 30, 1946, appellants filed a motion for a bill of particulars [R. 30-36] and on April 1, 1946, filed a motion to dismiss the indictment on various grounds [R. 37]. Both motions were denied on April 1, 1946 [R. 38]. Thereupon, the appellants, also on April 1, 1946, each entered pleas of not guilty to each count of the indictment [R. 38]. Beginning on June 18, 1946, a trial was had before the Honorable Judge J. F. T. O'Connor and a jury [R. 78-590].

At the conclusion of the Government's case, appellants made motions to strike the testimony of certain Government witnesses [R. 439], and for judgments of acquittal as to all the counts [R. 440-443], all of which were denied [R. *ibid.*].

The appellants themselves did not testify at the trial but they introduced certain evidence on their own behalf, and thereafter renewed their motions for acquittal [R. 447-469] and to strike certain evidence [R. 471]. These motions were again denied [R. 472].

The jury found appellants *Kissel* and *William Shubin* guilty as charged in counts 1 to 11, 16 to 18, 20 to 25 and 30 to 33, inclusive [R. 580-588], and found appellant *Frederick A. Shubin* guilty as charged in counts 1, 16 to 18, 20 to 22, inclusive [R. 580-586].

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[2]The Government ultimately dismissed Counts 12-15, inclusive; 19; 26-29, inclusive, and 34-40, inclusive, prior to submission of the case to the jury.

Statement of Facts.[3]

In our "Statement of Facts" we shall set forth the evidence most favorable to the Government; and in our argument below (pp. 23 *ff*) we shall collect such evidence as to the appellants, in demonstration of the correctness of the jury's verdicts and the adequacy of the evidence supporting the verdict.

At the outset it should be noted that the evidence which was before the judge and the jury in this case falls into three main categories: (a) documents constituting the written record of the transaction and consisting of invoices and other documents for each count, (b) testimony of witnesses as to particular transactions set forth in the various counts of the indictment, and (c) testimony of witnesses as to statements to them by appellants as to their activities.

Summary.

In brief, the record shows, entirely without contradiction or dispute, that appellants, engaged in the sale of meat at wholesale, sold meat at prices in excess of those permitted by law and failed to record upon their books and records the true price collected by them, showing only the legitimate portion of the price paid, concealing the over-ceiling part. In order to avoid disclosing to the Office of

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[3]Appellants have sporadically inserted in various parts of their opening brief various carefully selected and edited excerpts from the testimony of witnesses, as well as certain other so-called factual material. Appellants have completely failed to set forth before this Court the evidence most favorable to the Government upon which alone the sufficiency of the evidence in this case, as to each of the appellants, is to be tested. See, *e. g., Hemphill v. United States,* 120 F. (2d) 115, 117 (C. C. A. 9), cert. den. 314 U. S. 627.

Price Administration these illegal operations and collections, appellants also falsified their income tax returns. To further conceal from the O. P. A. the true collections made by them in sales of meat—a fact which they were specifically required by O. P. A. regulations (see Appendix, *infra*) to show truthfully on their records—appellants evolved a scheme whereby they would continue the false entries on their records but would seek to make known "confidentially" to the Bureau of Internal Revenue the true facts.

Statement of Facts.

In general, the evidence disclosed that on about November 16, 1942, appellants entered into a partnership under the name of Vernon Hotel and Restaurant Supply Company, which was, at all times material to this case, engaged, as were each of the appellants individually, in the sale of meat at wholesale in Los Angeles [R. 90, 476-477].

From at least November 16, 1942, to December 31, 1944, the appellants systematically collected from their meat customers cash charges over and above the maximum ceiling price permitted by the Act and the Regulations, on the sale of meat to such customers by the appellant [R. 401]. Invoices issued for each sale carried the ceiling price as the price paid; in addition, an overceiling charge was collected in cash. The appellants had the customers "educated" to the payment of such overcharges [R. 402] to such an extent that appellants only had to advise the customers of the lump sum for overcharges which was owed by them to the appellants in order to receive that money. These overcharges were computed and paid on a basis of so much per pound [R. 402].

More particularly, the evidence in this respect showed that:

Emil J. Dvorak,[3a] who operated a retail meat business, beginning in November, 1942, and thereafter, made purchases of meat from the appellants at their Vernon Hotel and Restaurant Supply Company [R. 89, 90, 180], which had just been organized [R. 94, 95, 96].[4]

Dvorak was given an invoice for each such transaction [R. 92, 98]; he always called for the meat with his own truck [R. 90, 131].

In about November, 1942, appellant William Shubin had discussed with Dvorak the subject of Dvorak's paying over the ceiling price for meat purchased by him from appellants [R. 93, 96]. Dvorak was having difficulty obtaining meat from other wholesalers [R. 185]. William Shubin told Dvorak "* * * if you want to stay in business you got to play ball" [R. 97, 185].[5]

Thereafter, Dvorak was required to pay to the appellants a "set" overceiling sum in buying meat from them [R. 185-186, 191]. Appellants had "come to some set figure that I [Dvorak] had to pay" in excess of the ceiling price [R. 186-187], and Dvorak was informed by appel-

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[3a]Dvorak's testimony is uncontradicted.

[4]Appellant's counsel stipulated that their partnership was formed on November 16, 1942. Prior to that time Dvorak had been making meat purchases from the predecessor concern of the Vernon Hotel and Restaurant Supply Company, which was operated as a partnership by appellant William Shubin and another [R. 90-91].

[5]Dvorak referred to appellant William Shubin as "Bill", appellant Jack Kissel as "Jack", and appellant Frederick Alexander Shubin as "Fred" [R. 90, 106-107, 164].

lants that he would be required to pay over the ceiling [R. 187, 189].

On about January 4, 1944, Dvorak purchased certain meat items from the Vernon Hotel and Restaurant Supply Company, in connection with which he received that company's invoice No. 39251 [R. 92, 99-101, 102]. Among the items embraced by that invoice were 126 pounds of short cut pork loins and 125 pounds of pork shoulders, New York [R. 102, 104].[6] The price per pound shown on the invoice for each of these items was the maximum price which appellants were permitted to charge under the Emergency Price Control Act and Maximum Price Regulations issued under it.[7]

Dvorak paid the invoiced price to a clerical employee at the Vernon Hotel and Restaurant Supply Company [R. 102, 104-105, 109]. In addition to that price, Dvorak then immediately paid an additional sum about five and three cents a pound[8] in cash on the items to appellant Kissel or William Shubin, who had computed the overceiling sum due them on a machine [R. 104, 105, 107, 108, 109, 110, 111, 171, 200].[9] Dvorak received no receipt for this extra sum [R. 110].

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[6]Meat items are designated on this invoice, as well as on all others, by hieroglyphics known to the meat trade, and translated by witnesses [See, *e. g.*, R. 93, 103, 104, 141].

[7]At the trial it was stipulated by counsel for appellants *that* in each instance the price shown on the invoice was the maximum ceiling price [R. 103, 104, 135-136, 149, 158-159, 179, 249].

[8]The overceiling sum per pound paid by Dvorak to appellants varied from time to time [R. 108, 109].

[9] This transaction is charged in Count 2 of the Indictment.

Moreover, he accepted the overceiling figure demanded because "* * * at that time I knew how much I was paying and I naturally figured whether they were overcharging me more than they should or not" [R. 110].

The testimony of Dvorak was not contradicted; neither of the appellants testified at the trial.

On various subsequent occasions Dvorak bought meat from the Vernon Hotel and Restaurant Supply Company, paying in each instance an overceiling sum to either Kissel or William Shubin [R. 101, 131-132, 144, 181]. In each instance Dvorak received an invoice, which is in evidence, which bears a number and shows the date of the purchase, the meat items sold to Dvorak, the ceiling price for each item, the total legal price for the entire transaction, and, in most instances, a notation showing that the invoiced amount was paid. As to each such invoice Dvorak paid the invoiced sum to the cashier. In addition Dvorak paid in cash to either Kissel or William Shubin an extra sum of money, computed at different rates running from three to eight cents a pound, over the legal ceiling price.

To save the time of this Court, we have summarized Dvorak's testimony and the exhibits in table form:

ount	Invoice No.	Date	Overceiling Sum		Overceiling Su Paid to
o. 3	39609 [R. 138]	1/21/44	234	lbs. at 5¢ lb. over [R. 136-137]	Kissel or W. Sh [R. 136-137]
4	41736 [R. 140]	7/19/44	100 85 98	lbs. at 3¢ lb. over " " 5¢ " " " " 5¢ " " [R. 139]	Kissel or Wm. Sh [R. 139]
5	42076 [R. 142]	8/ 4/44	136 157 103½	lbs. at 5¢ lb. " " " 3¢ " " " " 5¢ lb. " [R. 141-142]	Kissel or W. Sh [R. 141-142]
6	13563 [R. 145]	9/21/45	100 155	lbs. at 5¢ lb. " " " 3¢ lb. " [R. 144]	Kissel or W. Sh [R. 144]
7	16645 [R. 148]	12/12/45	182 138 137 189 115	lbs. at 3¢ lb. " " " 5¢ " " " " 5¢ " " " " 5¢ " ' " " 5¢ " " [R. 146-147]	Kissel or W. Sh [R. 146-147]
8	44072 [R. 151]	10/25/44	200	lbs. at 5¢ lb " [R. 150]	Kissel [R. 150]
9	13357 [R. 152]	9/17/45	293 191	lbs. at 5¢ lb. " lbs. at 3¢ lb. " [R. 152]	Kissel or W. Sh [R. 151]
16	14649 [R. 154]	10/22/45	800	lbs. at 7¢ lb. " [R. 153-154]	Kissel or W. Sh [R. 153]
17	3729 [R. 156]	5/8/45	111 79 68 43	lbs. at 3¢ lb. " " " 7¢ " " " " 5¢ " " " " 7¢ ' "	Kissel or W. Sh [R. 155]

NT	Invoice No.	Date	Overceiling Sum		Overceiling Sum Paid to
18	3327 [R. 158]	6/18/46	123	lbs. at 3¢ lb. "	Kissel or W. Shubi
			110	lbs. at 5¢ lb. "	[R. 157]
				[R. 157]	
20	15584 [R. 160]	11/15/45	193	lbs at 5¢ lb. "	Kissel or W. Shubi
			102	" " " " "	[R. 159]
			580	" " 3¢ " "	
			96	" " 5¢ " "	
			131	" " 3¢ " "	
			138	" " 5¢ " "	
				[R. 159]	
21	45741 [R. 161]	12/26/44	289	lbs. at 3¢ lb. "	Kissel or W. Shubi
			257	" " 5¢ " "	[R. 161]
			72	" " " " "	
			96	" " " " "	
				[R. 161]	
22	4437 [R. 163]	6/7/45	580	lbs. at 5¢ lb. "	Kissel or W. Shubi
			163	" " " " "	[R. 162]
			150	" " 3¢ " "	
			232	" " 5¢ " "	
			282	" " 5¢ " "	
				[R. 163]	
1(r)	44235 [R. 172]	10/31/44	134	lbs. at 5¢ lb. "	Kissel or W. Shubi
			129	" " 3¢ " "	]R. 170]
				[R. 169]	
1(t)	5252 [R. 175]	7/10/45	172	lbs. at 7¢ lb. "	Kissel or W. Shubi
			210	" " 7¢ " "	[R. 174]
				[R. 174]	
1(s)	5128 [R. 178]	12/ 4/44	172	lbs. at 3¢ lb. "	Kissel or W. Shubi
			150	" " 5¢ " "	[R. 177]
			64	" " 7¢ lb. "	
			37	" " 7¢ " "	
				[R. 177]	

George Veuhoff[10] had a retail meat market, known as "George's Market," between January 1 and the end of March, 1945 [R. 201, 202, 203]. During that period he purchased meat for his market from the appellants' Vernon Hotel and Restaurant Supply Company [R. 203]. Vieuhoff always picked up the meat at the company's plant [R. 222].

About "the first of the year in '45" [R. 222], Veuhoff had a conversation with appellant Kissel at appellants' plant, with regard to paying above the ceiling price [R. 222]. Kissel told Veuhoff that he would be required to pay an overceiling sum of about ten cents a pound on bacon and ham, three or four cents a pound on beef, and eight or ten cents a pound on pork loins [R. 223, 224].

On March 20, 1945, Veuhoff purchased 176 pounds of grade B veal from the Vernon Hotel and Restaurant Supply Company, and in connection with that transaction received their invoice No. 48245 [R. 203, 207]. He paid the invoiced price of $36.96, at the rate of 21¢ a pound, the ceiling price, to a clerical employee [R. 204].

In addition to the ceiling price, Veuhoff paid to William Shubin or Kissel the overceiling sum of seven cents (7¢) per pound in cash, making an added sum of $12.32 [R. 204].[11]

On this occasion, as well as on all others when Veuhoff bought meat from the appellants, the procedure followed was this, in Veuhoff's words:

> "I would get my meat and put it in the truck and then go in and get the bill and pay the girl. * * *

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[10]Veuhoff's testimony is uncontradicted.

[11]This transaction is charged in Count 11.

Bill [Shubin] [R. 207] would add it on the adding machine and then give me the total of the overcharge,"

and Veuhoff would "pay him in cash" [R. 205].

Other purchases of meat by Veuhoff likewise included the payment of an overceiling sum by him to Kissel or William Shubin, as shown in summary form in the following table:

UNT	Invoice No.	Date	Overceiling Sum	Overceiling Sum Paid to
30	47374 [R. 209]	2/14/45	1,085 lbs. at 3¾¢ lb. over [R. 207]	Kissel or W. Shubi [R. 208]
31	47348 [R. 213]	2/13/45	944 lbs. at 3¢ lb. " [R. 211, 212]	Kissel or W. Shubi [R. 211, 213]
32	46740 [R. 218]	1/26/45	558 lbs. at 10¢ lb. " [R. 215]	Kissel or W. Shubi [R. 216]
33	47034 [R. 220]	2/ 5/45	365 lbs. at 11¢ lb. " [R. 219, 221]	Kissel or W. Shubin [R. 219]

*In some instances Veuhoff recorded the overceiling payments on the reverse of th non Hotel and Restaurant Supply Company invoices [R. 209, 211, 214, 216] an showed such payments on his books [R. 210].

Austin T. Snyder[12] was in the retail meat business, operating as the "P & S Market" from 1937 until April, 1945, at which time he was drafted into the Army [R. 233].

During 1944 and 1945 Austin purchased meat from the appellants [R. 234].

On December 7, 1944, Austin bought from the appellants 256 pounds of hogs [R. 234, 239]. Austin called

[12]Snyder's testimony is uncontradicted.

for these hogs at appellants' plant [R. 234], and paid the invoiced, maximum legal price [R. 239] for the hogs to appellant Kissel [R. 238, 239].

In addition to the invoiced price, Austin paid to appellant Kissel the overceiling sum of eight cents per pound for the 256 pounds [R. 238].[13]

Austin made the following additional purchases of meat from the appellants, in each instance paying a cash sum in excess of the ceiling price:

ount	Invoice No.	Date	Overceiling Sum	Overceiling Su Paid to
o. 23	44976 [R. 241]	11/29/44	239 lbs. at 5¢ lb. over 309 lbs. at 8¢ lb. " [R. 240]	Kissel or W. Sh [R. 240]
25	47882 [R. 243]	2/26/45	588 lbs. at 8¢ lb. " [R. 242]	Kissel or W. Sh [R. 242]
10	47443 [R. 244]	2/16/45	836 lbs. at 3¢ lb. " [R. 243-244]	Kissel or W. Sh [R. 242]

When appellants first began collecting overceiling charges, they consulted their attorney "as to the proper method of recording the overcharges" so they could pay taxes on them [R. 402]. Their attorney advised them to report the overcharges, rejecting appellants' suggestion that they report them falsely as winning at gambling or horse races [R. 402-403].

Later, appellants' attorneys reported that they had "found a proper way to report" the overceiling sums for income tax purposes, without disclosing their illegal operations to the O. P. A. [R. 403]. Appellants' attorneys then

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[13]This transaction is charged in Count 24.

retained other attorneys in this connection, and the latter originated the method of disclosure to Internal Revenue which was subsequently followed by appellants [R. 403].

This method included the filing of amended income tax returns for the period from November 16, 1942, to December 31, 1944 [R. 463, G. E. 35-49]. These returns disclosed a partnership income of $141,125, not previously reported, and derived from overcharges in the sales of meat [R. 403, G. E. 35-49]. Also as a part of their method of disclosure to Internal Revenue (with continuing concealment as to the O. P. A.), appellants had a summary of their unreported illegal income prepared by a certified public accountant, and voluntarily furnished it to the Bureau of Internal Revenue [R. 403; see 408 *ff.*].[14]

In addition, on July 24, 1945, appellants William Shubin and Frederick Shubin voluntarily appeared with their attorneys at the Bureau of Internal Revenue in Los Angeles [R. 266, 267, 268, 280, 372, 374, 375, 463, 464-465], to offer facts in verification of their amended income tax returns previously filed [R. 266, 267, 374, 463].[15]

William Shubin appeared in the morning, and Frederick Shubin in the afternoon. Both Shubins were advised by Internal Revenue agents, in the presence of their attorneys, that they had the right to refuse to answer any question or to refuse to incriminate themselves, and that anything they said or any documents they furnished might be used against them [R. 268, 280, 372-373, *465*]. Their

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[14]The legal questions raised by appellants in this connection are discussed fully below.

[15]This investigation had no connection with the O. P. A. [R. 267-268, 279. Admittedly no subpoenas had been issued by the Bureau [R. 373, *465*].

attorneys then, admittedly, advised them to answer [R. 465]. A verbatim transcript of all questions and answers was then made, and later examined by the Shubins [R. 268, 269, 280-284, 375] and their attorneys [R. 282, 375], and signed by the Shubins [R. 268, 280-284, 375].[15a]

Appellant William Shubin at his conference stated[15b] that the $141,000 reported as additional income received by the partnership from November, 1942, to December 31, 1944, consisted of *overcharges collected by the partnership in the sale of meat in excess of the O. P. A. ceiling prices and in excess of the prices shown on the invoices* [R. 377-378, 380]. Shubin stated that he and each of the other two appellants usually collected the overcharges in cash, at the time each transaction occurred, and that the other appellants handed to William Shubin the overcharges collected by them [R. 378, 381]; that the overcharges were not shown on the invoices, only the ceiling price being stated upon them [R. 378, 380]; that the invoiced price was usually paid by check, while the overceiling amount was collected in cash, in secret in "the cooler or outside the vision of most of the employees around the office" [R. 379]; that Shubin kept a temporary record of overcharges due, destroying it when payment had been made [R. 380]; that he kept the overcharges cash in a drawer in the office, in his pocket, or at home where he hid it until needed [R. 380]; that he supplied his partners with money from

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[15a]Although rejected upon appellants' objection when offered in evidence by the Government, these statements were reproduced in the record on appeal upon designation for printing by appellants' counsel [R. 473 *ff.*].

[15b]These facts were related by Special Agent Bircher of the Bureau of Internal Revenue, whose testimony is wholly uncontradicted and was not subjected to cross-examination.

this fund as needed by them and gave them occasional accountings of the funds [R. 380-381]; that they had about $70,000 left in cash when they filed their supplemental income tax returns [R. 381].

William Shubin stated that he determined the rate of the overcharges [R. 382], saying to customers, "You owe me so much" [R. 402]. The customers did not have to be prompted to make their overceiling payments because William Shubin "had them trained" [R. 382] and "educated" [R. 403] so that if they wanted to obtain meat "they had to come forward" [R. 382].

No entries of the overceiling sums collected were made on the partnership records because appellants "did not want the O. P. A. to find such a record that they were overcharging" [R. 382].[16]

Each of the appellants shared equally in all profits of the partnership, including overceiling collections [R. 383].

On July 24, 1945, also, appellant Frederick Shubin, accompanied by appellants' attorneys [R. 416, 417], appeared voluntarily at the Bureau of Internal Revenue and, after warning as to his right not to answer or incriminate himself [R. 417], and upon the advice by his attorneys to answer questions [R. 417, 418], gave information as to the partnership income.

Appellant Frederick Shubin stated[16a] that the partnership had collected overceiling charges in the sale of meat during 1942-1944 in the sum of about $141,125 [R. 420]; that

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[16]Some such collections were recorded under false sales invoices [R. 382-383, and 367-369].

[16a]Agent Bircher's testimony as to this conference is uncontradicted and was not subjected to cross-examination [R. 431].

these overcharges were collected in cash, while the invoiced amounts showing the ceiling price were paid by check [R. 420, 423]; that he collected overceiling charges, as did appellants William Shubin and Kissel [R. 420, 422]; that overceiling sums were retained by William Shubin at his home [R. 420, 422]; that they did not tell their bookkeeper of the overceiling charges because they "did not want people to know they were in the black market" [R. 421], but that they finally made disclosures to their certified public accountant [R. 421].

Frederick Shubin stated that all three of the partners were to share equally in all profits of the partnership, including the overcharges [R. 421]. He stated that the reason appellants did not want those overcharges recorded on their books, was because they were conscious of the fact that O. P. A. rules permitted treble damage recovery for overcharges [R. 421]. He said that he had discussed the entire matter with their attorneys [R. 421]; that he had wanted to pay his taxes and report the profits, but that the partners did not know how to do so "without putting themselves liable to revocation of their license as wholesalers, meat wholesalers" [R. 422].

On August 1, 1945, appellant Jack Kissel, accompanied by appellants' attorneys, appeared at the Bureau of Internal Revenue, and voluntarily made various statements, after warning about self-incrimination [R. 404-405, 423-424; see also 427], and presented on behalf of the partnership the C. P. A. audit report prepared by appellants'

accountant on their behalf and at their request [R. 404-405, 408, 415, 427-8].

This report [R. 408-415] discloses that appellants collected $141,125 in overceiling charges during 1942-1944 [R. 409]; that this sum was distributed among the three appellants [R. 409, 411]; that appellants entered part of their overceiling collections upon their "additions and withdrawals from investment" account [R. 419-410], part in their "Exchange Account" [R. 411]; that part of the overceiling sums went directly into each appellant's personal bank account [R. 412-413], part was spent by the individual appellant [R. 414][17] and part retained by one of them in cash [R. 414].

On August 1, 1947, also, Kissel, in the presence of his attorneys, stated that the $141,125 represented "black market profits," overcharges collected in excess of O. P. A. ceiling prices by appellants in the sale of meat [R. 427]; that the $141,125 shown by their C. P. A. report was money not recorded on the partnership books for the most part [R. 428]; that fictitious invoices were used "to plug in some of that money into the business" [R. 428]; that they wanted to pay taxes on their entire income but were "afraid they would lose their license if they showed those excess charges that had been collected" [R. 428]; that overcharges were collected by all of the appellants [R.

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[17]The bank records are in evidence [R. 122, 166, 168, 432; Govt. Exhibits 1, 2, 3, 4, 19, 23, 24].

428], in cash, which was given to William Shubin [R. 428] who kept such funds at home [R. 428]; that he and Frederick Shubin trusted William Shubin to "make a fair distribution to them all" [R. 428].

In August and September, 1945, appellant William Shubin and the other appellant [R. 327] also admitted, often in the presence of each other [R. 317], that during the years 1942-1944 [R. 324, 331-334] a portion of the partnership's income came from "overcharges * * * charges made over the ceiling price paid in cash" [R. 325], while the balance of the income came from payments on invoices which billed meat at O. P. A. ceiling prices [R. 324-325]; that part of the cash derived from such overcharges was recorded on the partnership's books as "advances and withdrawals to capital" [R. 326, 336, 337]; that the overcharges recorded on the books as "advances and withdrawals to capital" were deposited to the partnership bank account [R. 327].[18]

William Shubin, in the presence of one or both of the other appellants, also admitted that the partners had used their "additions and withdrawals to capital" account on their partnership books to record the cash received from overcharges upon sales of meat [R. 336, 337]; that the money derived from overcharges was accumulated in cash

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[18]All of the facts discussed here were furnished in the main by William Shubin at appellants' place of business. The other two appellants almost invariably referred all inquiries to him, and he often gave his answers in their presence [R. 327, 331, 333, 334, 335-336, *340, 341*].

at appellant William Shubin's residence and was deposited to the partners' business bank account from time to time as required in their operations, and entered on their books as additions and withdrawals from capital (without disclosure of its source) [R. 337].

Appellant William Shubin made out numerous false invoices[19] of the Vernon Hotel and Restaurant Supply Company purporting to show actual sales of meat; these invoices, however, were false, and were merely used by appellants to place upon the books of the partnership funds received from overcharges in other sales of meat by appellants [R. 365-369].[20]

Appellants also told Agents Eustice and Phoebus that various specific identified sums which were deposited to their personal bank accounts or used by them in other ways were obtained as overcharges in the sale of meat [see, *e. g.,* as to *Kissel*—R. 345, 351-352, 359-360, 361; *William Shubin*—345-346, 354-356, 360-361; *Frederick Shubin*—345-346, 349, 352-353, 357-358, 359].

William Shubin and Frederick Shubin also told the investigators that a sum of $46,000 shown under the "exchange account" on the partnership's books, was derived almost entirely from overcharges in the sale of meat [R. 353-354].

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[19]A list of 92 is in the record [R. 367-369].

[20]All of these facts as to the August conversations were testified to by Internal Revenue Agent Eustice. He was neither cross-examined as to any of them [R. 371] nor otherwise contradicted.

The appellants did not testify at the trial. Their defense witnesses were several Internal Revenue agents, who were questioned concerning the statements they had made to appellants *after appellants had voluntarily appeared before and given information to Internal Revenue agents as to their black market dealings,* as to the use to which appellants' admissions to them could be put [R. 447-452];[21] the writer of this brief, Assistant U.S. Attorney William Strong, who was questioned concerning proceedings before the Grand Jury [R. 453-459]; and appellants' tax counsel, who had been an attorney for 26 years [R. 467] and who had appeared with them at the Bureau of Internal Revenue after appellant had voluntarily filed their amended returns under his supervision [R. 463].

Without a single denial as to any material fact, appellants rested their case [R 469].

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[21]Appellants first appeared with their attorneys on July 24, 1947 [R. 372], and the conversations concerning which the agents were questioned, mentioned above, occurred in August, 1947 [R. 448, 45]. Even then appellants were in effect advised by these agents they could disclose appellants' statements upon authorization by the Treasury Department [R. 449-450, 452].

ARGUMENT

Appellants have placed before this Court five questions on appeal (A. B. 6, *ff.*),[22] which they subdivide into seven separate points. We shall discuss these seven points *seriatim.*

Point One

(a) Appellants assert in effect (A. B. 9-12) that the trial court committed reversible error in overruling appellants' objections to the testimony of the retail meat dealers who testified that appellants collected overceiling charges from them. More specifically, appellants protest that none of these retailers could particularize exactly which appellant collected the overcharge, except in one instance, stating that one or another of appellants Kissel and William Shubin were the collectors. Consequently. appellants, further assert (A. B. 9) the evidence is insufficient to convict them. These contentions are without merit.

At the outset it should be noted that each count charges all three of the appellants with the commission of the same offense (R. 2, *ff.*). This is clearly proper. Manifestly, therefore, all of the appellants could have been found guilty as to each count. And appellants' contention that the testimony of these witnesses could not have justified a verdict against more than one of the appellants, and that the other appellants would necessarily have to be exonerated on each count (A. B. 12), is without basis in fact or law.

The evidence was patently relevant and material, and its admissibility was within the discretion of the trial

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[22]Reference preceded by "A. B." are to appellants' opening brief on appeal.

court. See, *e.g., Moore v. United States,* 150 U. S. 57; *McCondless v. United States,* 298 U. S. 342; *United States v. Feldman,* 136 F. (2d) 394 (C. C. A. 2). See also *William H. Frederick, et al. v. United States,* decided July 18, 1947 (C. C. A. 9). And the issue is not one of admissibility, but rather one of legal weight and effect of the testimony admitted.

In this respect it is necessary to consider all of the evidence, not only the testimony of the retailers, in full, and the documentery evidence adduced through them.

Thus, the jury had before it not only the testimony of the retailers as to the overcharges (*supra,* pp. 7 *ff*) and their testimony as to the prior arrangements to pay them, but also the testimony of the Internal Revenue agents as to what appellants had themselves admitted with respect to the extent, scope, method, and participation by each appellant in their overall scheme to collect black market charges from their customers (*supra,* pp. 14 *ff*), the amended income tax return filed by appellants disclosing overceiling collections in the sum of $141,125 [Govt. Exs. 35-49], the entire scheme to conceal these illegal collections, discussed more fully below. In addition, the jury, of course, had the right to draw reasonable inferences from the evidence before it. The legal effect of all the testimony before the jury was such as to allow it to convict one or all of the defendants on each count.

The trial judge was clearly correct, we submit, in admitting in evidence the testimony concerning which appellants complain under this point. And the jury was plainly warranted from all the evidence before it finding that the appellants were guilty, as found by its verdicts.

(b) The instruction sought by appellants (A. B. 12) as to a partner's liability for the criminal acts of his co-partner, clearly had no place at the trial below.

The evidence demonstrated beyond all doubt that each of the three partners in this case not only engaged in the illegal acts charged, but also participated in the illegal scheme and in illegal profits. The criminal acts performed by each partner were plainly performed as a part of the partnership business and with the knowledge and consent of each of the other partners.

Under the facts and evidence in this case, the trial judge correctly rejected the requested instruction No. 10.

Point Two

Appellants complain (A. B. 13 *ff.*) that the trial judge erred in admitting "opinions," "estimates" and "speculative" evidence as to the sums charged by appellants over the ceiling, and the number of times such overcharges were made.

(a) Appellants are clearly wrong in thus characterizing the testimony as to the amounts of overcharges. The testimony consisted of neither "opinions" nor "estimates," and certainly was not "speculative."

As stated by the witnesses (*supra,* pp. 9 *ff*), and admitted by appellants (*supra,* pp. 17 *ff*), the overceiling sums collected by appellants varied from time to time. Each witness testified to a precise overceiling sum paid by him as to each item concerning which he was questioned (see testimony and tables above, pp. 7 *ff*). Even in the testimony quoted by appellants in support of this point (A. B. 14-19), a precise overceiling sum was stated by

each witness.[23] Clearly appellants have no cause to complain.

(b) Appellants' complaints (A. B. 13 *ff.*), as to the testimony respecting the number of times witnesses said they paid overceiling to appellants, are likewise baseless.

First of all, it was immaterial how many times any purchaser paid overceiling to appellants. Insofar as the counts charging substantive violations of the Emergency Price Control Act were concerned, as each such count that the jury found one or more of the appellants guilty, a specific invoice was admitted in evidence and a purchaser testified that he paid the ceiling sums shown on that invoice but he also paid a specified overceiling amount (see *supra,* pp. 8 *ff*, including tables, pp. 10 *ff*).

Moreover, appellants admitted to others that they collected overceiling sums, to the extent of $141,125, in a little over two years (*supra,* pp. 15 *ff*).

Manifestly no reversible error was committed by the trial judge in admitting in evidence the testimony objected to by appellants under this point.[24]

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[23]Thus Dvorak testified in the excerpt quoted by appellant (A. B. 13 *ff.*) that he paid 5 cents a pound over ceiling for shortcut pork loins, 3 cents a pound for the "New York", 8 cents a pound for smoked hams (A. B. 14-15), while witness Snider testified that he paid 8 cents a pound overceiling for pork, 5 cents a pound for "bellies," 8 cents a pound for hogs, etc. (A. B. 17-19).

[24]While appellants do not so state expressly, they also appear to attack under this point (A. B. 17-19) by innuendo the testimony of one of the witnesses on grounds of credibility. Such an attack is, of course, useless before an appellate court. The question of credibility was exclusively for the jury, and was decided adversely to appellants.

And the fact that the witness refreshed his recollection during a recess, is likewise without weight here, since it also goes to credibility.

Point Three

(a) Appellants object to the penalties imposed in this case (A. B. 20). While they admit that the imposition of sentences is "a matter generally within the province of the trial court" (A. B. 6), they also assert that the punishment in this case was excessive, that they know of no similar case (A. B. 6), and seek to convey the impression that the total overcharges involved in this case were about $500.00 (A. B. 5).

The total black market overcharges conclusively shown to have been collected by appellants, were $141,125 (*supra*). Likewise conclusively established by the record was a scheme to violate the Emergency Price Control Act and Regulations so brazen, wilful, deliberate, and coldly calculated, as to permit no sympathy for appellants' present plight.

The wholly discretionary sentence imposed by the trial judge was well within the maximum of imprisonment and fines which could have been imposed upon each of the appellants. Compared to the admitted overceiling collections, appellants are still ahead over many thousands of dollars as a result of their openly illegal acts.

To agree with appellants' contention that the sentences were excessive, is to countenance deliberate disobedience of the law on a vast scale and reduce the penalty exacted to a mere percentage payment on the overall overcharges, amounting in effect to a mere license fee to operate illegally. Surely this court will never countenance such a proposal.

The sentences should be permitted to stand.

(b) Appellants' "good faith" was not, contrary to their contentions (A. B. 20-*ff.*), an issue in this case.

Insofar as mental attitude was an ingredient of the offenses charged, the only element which the government was required to establish as to count 1 was that appellants acted "intentionally," and under the other counts, that they acted "wilfully."

The trial judge gave complete instructions as to these elements (R. 546, *ff.*). His refusal to give the specific instructions sought by appellants (A. B. 22-23), was clearly correct. Those requested instructions fail to state the law correctly and seek to inject into the case irrelevant considerations.

Moreover, the circumstances under which appellant collected the overceiling charges, which we have detailed above, disclose clearly that such black market charges were a *sine qua non* to the sale of meat by appellants; that was the primary objective of all of appellants' machinations—overceiling collections. To argue, as appellants now would appear, to, that their "good faith" was not fully placed before the jury, is not only to reject the controlling law on the subject, but also to deliberately brush aside all of the evidence in the case. That this court obviously will not require or do.

Then, appellants' knowledge or lack of knowledge of the regulations which they urge as a ground for reversal (A. B. 22), is likewise irrelevant. Apparently appellants and their counsel are not convinced of the universally accepted fact that ignorance of the law is not an excuse for its violation. And they likewise appear to be unaware of the established law that it is not necessary for the government "to prove the terms of any of the regulations" (A.

B. 22) whose proper promulgation and publication in the Federal Register neither was, nor can be successfully challenged in this case.

The trial judge's instructions here [R. 546, *ff.*] are correct and amply set forth the controlling law. Appellants' complaints on this score also are baseless.

Point Four

Appellants assert (A. B. 25) that they were denied a fair trial because the trial judge admitted in evidence testimony by Internal Revenue agents of statements made to them by the appellants.

Upon this contention, covering twenty-seven pages of their brief, appellants place their heaviest reliance in their fight to upset the judgments below. Here again, however, appellants magnify to unjustified proportions ordinary administrative acts of government officials, performed in full compliance with applicable statutory and regulatory requirements. Once more appellants seek to divert this Court's attention from the magnitude of their own offense by a microscopic examination and telescopic enlargement of every word and deed. Although appellants seek to shift the burden from their own shoulders to that of others, they clearly do not succeed.

Briefly, what transpired was this:

As we have already demonstrated above, in perpetrating their continued and planned disregard of the O.P.A. regulations as to maximum prices on meat, appellants also found it necessary to falsify their records so as not to show the true prices collected by them, to avoid detection by the O.P.A. of their price violations. Appellants also deliberately falsified their income tax returns, in the main

for the purpose of misleading the O.P.A. This placed appellants in the position of committing the additional violations of income tax evasion.

Although appellants were not disturbed by the fact that they were engaged in wilful violation of the O. P. A. law and regulations, they appear to have taken a more serious view of their income tax frauds and consequently cast about for ways and means to improve their status in the latter respect. Appellants therefore sought the aid of their attorneys, who in turn sought more specialized counsel. The latter, tax consultants, devised a method whereby, in their opinion, appellants could continue their concealment of their true income from the eyes of the O. P. A., while simultaneously disclosing the true facts to the Bureau of Internal Revenue.

Guided by counsel and under their direction, appellants voluntarily filed, as admitted by them (A. B. 25), an amended partnership income tax information return and amended individual income tax returns [R. 264, 437], disclosing the receipt of $141,125 in additional, previously unreported, income. Then, still under the guidance and direction of their counsel, appellants voluntarily appeared before agents of the Bureau of Internal Revenue assigned to investigate the amended tax returns by appellants.

There, after appropriate warning that they had the right to refuse to speak and to refuse to incriminate themselves, and after consultation with their counsel, and upon the latter's advice, appellants made to the Internal Revenue Agents complete disclosures, in substantiation of their returns, of the true amount, nature and source of their $141,125 additional income. The statements made by appellants were reduced to writing and, after examination by appellants and their attorneys, were signed under oath

by appellants. In addition, and for the same purpose, appellants voluntarily submitted to the Bureau of Internal Revenue a financial report as to the $141,125, prepared by their accountant [R. 404, 408].

As conservatively characterized by appellants (A. B. 25), the statements made by them "show that defendants [appellants] had been selling their products at over ceiling prices." What this artful understatement fails to say, is that appellants' statements disclose a systematic, planned, concerted and arrogant disregard of the mandatory provisions of an Act of Congress, the Emergency Price Control Act, and disclose an illegal scheme of proportions and ramifications not often brought to light.

At the trial, the written statements were offered in evidence. However, upon a strict construction of the letters authorization given to the Internal Revenue agents to make disclosure of the facts and evidence in their possession (see also *infra,* pp. 36 *ff*), the trial judge sustained appellants' objection to the admission in evidence of the written statements.[25]

The letters of authorization [R. 273, 277] name appellants' partnership, the Vernon Hotel and Restaurant Supply Company, under which every act material to this indictment was committed; the letters do not name each partner—appellants—individually. The trial judge held that the written statements signed by appellants were, therefore, not admissible in evidence. He did admit, however, statements made by appellants as to the source of the *partnership* income, in view of the specific identification of the partnership by name in the letters of authori-

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[25]The signed written statements, were printed in the record [R. 473 *ff*.] upon appellants' insistence.

ty [R. 273, 277]. We submit that the trial court was not only correct as to the evidence admitted in this respect, but also could and should have admitted in evidence appellants' written, signed statements.

The Evidence Adduced from the Internal Revenue Agents Was Properly Received Into the Record.

The sole question presented at this point is whether the trial judge committed reversible error by admitting into evidence the testimony of the Internal Revenue Agents as to statements made to them by the appellants respecting the income of the Vernon Hotel and Restaurant Supply Company. We submit that no reversible error was committed in this connection.

Income tax returns, an information return such as was filed by the partnership here, and "schedules, lists and statements designed to be supplemental to, or become a part of, the returns," are all subject to the same rules and regulations as to inspection (See appellants' Brief, pp. 27-29 for regulations). These provide in effect that all of the above may be obtained by a United States Attorney for official use before a grand jury or in litigation in which the United States is interested, or for use in preparation for either; that these may be obtained upon written request of the Attorney General, an Assistant Attorney General, etc.

Here an Assistant Attorney General in writing requested the Commissioner of Internal Revenue for permission to inspect and use statements and other documents and to have Internal Revenue agents testify before the grand jury and at a trial [R. 294-298]. Such authority was granted by the Acting Commissioner of Internal Revenue [R. 273-274, 277-279], and certified copies of

the amended information and income tax returns were furnished by him under his signature [Govt. Exhibits 35-49],[26] and he authorized the Internal Revenue agents who testified at the trial below to do so, as well as to testify before the grand jury and give information to the U. S. Attorney [R. 273, 277], *and authorized such testimony not only as to the partnership but also as to "the members of a partnership called Vernon Hotel and Restaurant Supply Company"* [R. 273, 278]. (Italics ours.)

There was, thus, strict compliance here with every provision of the law and regulations, and the information and documents in the possession of the Internal Revenue Agents were duly made available to the government in full conformance with legal requirements.

The propriety of this procedure has been recognized by this Court in *Gibson v. United States,* 31 F. (2d) 19, cert. den. 279 U. S. 866. See also *Greenbaum v. United States,* 113 F. (2d) 113, 126 (C. C. A. 9); *Leroy v. United States,* 29 F. (2d) 462, 464 (C. C. A. 7), cert. den. 279 U. S. 850, *Lewis v. United States,* 38 F. (2d) 406 (C. C. A. 9). And while appellants must be aware of the holding in the *Gibson* case since they cite it (A. B. 29), they avoid mention or explanation of its terms in this respect in their brief, electing instead to argue at great length contentions no longer open to them under all of the above decisions.

In the *Gibson* case the indictment charged a conspiracy to violate the National Prohibition Act. In support of its case, the government there introduced in evidence, over

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[26]T. D. 4945, Sec. 463 D5 (C. C. H., par. 518) provides in part:

"Certified copies [of returns] will be furnished only upon specific request therefor sent to the Commissioner at Washington."

objection by the defendant, an affidavit made by the defendant *six months after the return of the indictment*, and had delivered it to a deputy collector of internal revenue *with the assurance on the part of the deputy that it would be considered only as bearing on affiant's income tax obligation*. The decision states (p. 22):

> "Over objection the court received in evidence an affidavit made by defendant Curtis in August, 1927, about 6 months after the indictment was returned. Curtis delivered the affidavit to a deputy collector of internal revenue, with the assurance on the part of the deputy that it would be considered only as bearing on affiant's income tax obligations, and would not be used against him in any case pending in court. It is in the nature of a supplementary return, and the statements therein made bear somewhat remotely upon the question of Curtis' guilt. * * *"

> "The deputy collector was incompetent to waive such right, if any, as the government had under the law to make use of the affidavit as evidence, and the remaining question is of such right. By a rule of the Treasury Department (Regulations 69, art. 1091; Treas. Dec. 2962; *In re* Epstein (D. C.), 300 F. 407; *Id.* (C. C. A.), 4 F. (2d) 529), it is provided that upon the written request of the Attorney General, or one of his assistants, an income tax return or a copy thereof may be furnished by the Commissioner to a United States attorney for use as evidence in any litigation in court, where the United States is interested in the result. Or, if the return is in the possession of a collector, it may, upon the conditions stated, be furnished by him. When the return or a copy thereof is so obtained, its use is to be limited to the purpose for which it is furnished, and unnecessary publicity is to be avoided. The use of re-

turns in legal proceedings with such limitations is also recognized in the President's executive order of April 13, 1926, approving regulations of the Secretary of the Treasury, paragraph 14 of which provides: 'In the case of returns or copies thereof furnished by the department for use in legal proceedings only such inspection as necessarily results from such use is permitted.' Regulations 69, p. 203. The record shows that, following a telegram from the district attorney to the Attorney General, requesting that authority be secured from the department for the use of the affidavit, a telegram was received by the collector having custody of the affidavit, from the Commissioner, directing him to produce it and to furnish a copy thereof, if a copy was desired by the district attorney. Indulging the presumption of official regularity, we think this was sufficient to warrant what was done."

In the *Lewy* case the Appellate Court, in part, said (p. 464):

"The contention that those government returns were improperly admitted in evidence, because the statute provides that they are not open to inspection, is not well grounded. Revenue Act 1924, §257, reads in part: 'Returns upon which the tax has been determined by the Commissioner shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President. * * *' (43 Stat., p. 293.)

"Treasury Regulations No. 65 shows that the President directed that such returns should be open to inspection in accordance with the regulations prescribed by the Secretary of the Treasury. Treas. Reg. No. 65, art. 1090, p. 192. Regulation No. 14

(page 194, Treas. Reg. No. 65), prescribed by the Secretary of the Treasury, provides: 'A person who under these regulations is permitted to inspect a return may make and take a copy thereof or a memorandum of data contained therein.'

"Article 1091, Treasury Regulations No. 65 (page 195), states: 'The original income return * * * or a copy thereof, may be furnished by the Commissioner of Internal Revenue to a United States attorney for use as evidence before a United States grand jury or in litigation in any court, where the United States is interested in the result. * * *'"

Because, as we said (*supra,* p. 31), the letters of authority here in the caption only identified the appellants by their partnership name of Vernon Hotel and Restaurant Supply Company, the trial judge confined the testimony of the agents to statements by appellants relative to the partnership income, excluding from evidence the individual's returns and their written, signed statements [R. 318-321]. Had the trial judge admitted the evidence as to the individuals, he would have been fully justified in view of the fact that the only persons who constituted the partnership entity, were the appellants. Clearly, however, the trial judge's ruling was more than fair to appellants, and plainly without error in any respect.

Thus the agents testified only concerning statements made to them by appellants *as to the income of the Vernon Hotel and Restaurant Supply Company;* they did not testify concerning the income of the individual partners, which consisted, of course, of each partner's distributive share of the partnership income. Manifestly, appellants have no cause to complain on this score.

Furthermore, a federal court probably has the power to order an Internal Revenue agent to testify even in the absence of express authority to the agent from his superiors. To hold the contrary is to deny to the court one of its most important powers, that of compelling testimony. And to circumscribe that power by the exercise of the will of an agent's superior, would likewise render the power a nullity dependent upon the superior's general attitude and personal construction of the law and the facts. Such a result clearly cannot prevail.

The enumeration of various functionaries who must follow a definite procedure to obtain access to documents and information in the possession of the Internal Revenue Bureau, without inclusion of the courts, expressly indicates, we submit, that the general power of the courts to compel testimony was not being restricted by Congress in any respect. Had there been no letters of authority whatsoever to the agents in this case, the trial judge could nevertheless have compelled them to testify at the trial.

In fact, at the request of the appellants, two agents, only one of whom had previously testified for the government, and neither of whom had express authority to testify as a witness for the appellants, were called to the stand by appellants and required to give testimony on a new subject [R. 447-452].[27]

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[27]Also, upon appellants' demand, the trial judge required the prosecuting attorney to testify as a witness for the appellants concerning events before the grand jury—a secret proceeding—and despite the prosecuting attorney's statement that he did not know whether he was authorized to testify [R. 452], and that he had testified in one proceeding and later had been informed that he had no right to do so [R. 452].

Plainly the trial court committed no reversible error by admitting the agents' testimony into the record.

Appellants assert also (A. B. 33, *ff.*) that the use of the written statements, not admitted in evidence, by the agents to refresh their recollections, constitutes ground for reversal of the judgments. The assertion is specious.

The short answer, aside from the fact that oral testimony is admissible even if written memoranda or it may not be admissible, is that the use of any object in itself inadmissible in evidence, to refresh a witness' recollection, is always proper, provided it tends to aid the witnesses to remember. See, *e.g.*

Goldman v. United States, 118 F. (2d) 310 (C. C. A. 2), cert den. 313 U. S. 588, aff'd 316 U. S. 129;

Luse v. United States, 49 F. (2d) 241;

Jewett v. United States, 15 F. (2d) 955 (C. C. A. 9);

Olmstead v. United States, 19 F. (2d) 842 (C. C. A. 9);

Delaney v. United States, 77 F. (2d) 917 (C. C. A. 3);

Hodson v. United States, 250 Fed. 421 (C. C. A. 8);

Briggs Mfg. Co., v. United States, 30 F. (2d) 962 (A. C. Conn.), rev'd on other grds. 40 F. (2d) 425;

Breese v. United States, 106 Fed. 680 (C. C. A. 4).

As stated by this court in the *Jewett* case, *supra* (p. 956):

"* * * it is quite immaterial by what means the memory is quickened; it may be a song, or a face,

> or a newspaper item, or a writing of some character. It is sufficient that by some mental operation, however mysterious, the memory is stimulated to recall the event, for when so set in motion it functions quite independently of the actuating cause."

More important, however, is the fact that the writings from which the agents refreshed their recollections, the statements signed by appellants, *were at all times legally and properly in the agents' possession,* regardless of whether they may or may not have been properly in the prosecutor's possession. Thus during the period of the agents' continuous legal possession of and access to the written statements, the agents themselves were always entitled to use those documents for all purposes within the scope of their authority. If the agents could testify at all, they certainly could use their papers to refresh their memories.

Appellants assert in effect that the statements made and information furnished by them to the agents was confidential (A. B. 35-37), and that they were assured that no one but the Internal Revenue Bureau would have access to them (A. B. 39, 42, 45). Neither is true.

There is no confidential relationship between government agents and those who come before them; and appellants do not—as they cannot—point to any legal basis for their position in this respect. The California Code section cited by them (A. B. 64) clearly is not applicable here either on the law or the facts to this case.

Appellants' assertions that they were led to believe by government agents that their disclosures would be kept secret, are likewise untenable. First of all, there is not

one iota of accepted evidence to support them in this respect.[28]

Appellants, admittedly, voluntarily filed amended income tax and information returns, under guidance of experienced tax counsel. These expert counsel could hardly claim ignorance of the provisions of the United States Code and Internal Revenue dealing with disclosure of information by the Treasury Department to the United States Attorney!

Then, the Internal Revenue agents testified *without contradiction, (supra)* and appellants' counsel admitted (A. B. 47-48) that appellants appeared voluntarily to give supporting information in connection with their amended returns (A. B. 30, R. 372 *ff.*); that their counsel were present at all such conferences (*id*); that appellants were specifically warned of their constitutional right against self incrimination, and warned that the statements they made or any documents or evidence they produced could be used against them in any subsequent proceeding by the government; that appellants then consulted their attorneys, who advised them nevertheless to answer (*id*).[29]

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[28]Of course, here, as elsewhere, only the evidence most favorable to the government will be considered upon this appeal, and any conflicts in evidence are to be disregarded, with full credit being given to the evidence supporting the judgments below.

[29]Appellants' statement (A. B. 46) that "there is no evidence that appellants were ever asked to waive the provisions of the Treasury Regulations relating to the use by the government in any actions of their oral or written statements," is not supported by either the facts or the law. Moreover, no such waiver was required as the Treasury Regulations affirmatively provided a method making all documents and information obtained by employees available to the United States Attorney.

This constituted a waiver, of course. See *e.g.*:

Heller v. United States, 57 F. (2d) 627 (C. C. A. 7), cert. den. 286 U. S. 567;

Viereck v. United States, 139 F. (2d) 847 (App. D. C.), cert. den. 321 U. S. 794;

Hartzell v. United States, 72 F. (2d) 569 (C. C. A. 8), cert. den. 293 U. S. 621;

United States v. Gilbert, 31 Fed. Supp., 195 (D. C. Ohio).

See also: *United States v. Sullivan,* 274 U. S. 259.

Then evidence showing any fact relevant to the charge in the indictment,[30] or evidence tending to throw light upon the conduct of the accused,[31] is admissible.

While appellants, in support of their contention that they were assured that "the statements would be for the eyes of the Internal Revenue Department," (A. B. 52) state that one of the agents admitted that "before the appellants gave their respective statements there was a discussion off the record [R. 375]" (A. B. 52), appellants fail to apprise the court at this point that their own tax counsel admitted on the stand that in the discussion

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[30]See, *e. g.: United States v. Tandaric,* 152 F. (2d) 3 (C. C. A. 7), cert. den. 66 S. Ct. 703; *United States v. Rubenstein,* 151 F. (2d) 915 (C. C. A. 2), cert. den. 66 S. Ct. 168; *Hilliard v. United States,* 121 F. (2d) 992 (C. C. A. 4), cert. den. 314 U. S. 627; *Troutman v. United States,* 100 F. (2d) 628 (C. C. A. 10); *Crapo v. United States,* 100 F. (2d) 996 (C. C. A. 10); *Suhay v. United States,* 95 F. (2d) 890 (C. C. A. 10), cert. den. 304 U. S. 580.

[31]See, *e. g.: Hodge v. United States,* 126 F. (2d) 849 (App. D. C.); *Robinson v. United States,* 144 F. (2d) 392 (C. C. A. 6), cert. den. 323 U. S. 789, rehear. den. 324 U. S. 889; *Devoe v. United States,* 103 F. (2d) 584 (C. C. A. 8), cert. den. 308 U. S. 571; *United States v. Sebo,* 101 F. (2d) 889 (C. C. A. 7).

off the record he advised the appellant to whom he was speaking that it was proper for him to answer the questions put to him [R. 465]. And he admitted that no such purported guarantee of secrecy was included in appellants' signed statements [R. 468].

What happened here is clear: Appellants' counsel, seeking a method whereby their illegal income could be disclosed for tax purposes while continuing its concealment from the O. P. A. and others, evolved what they conceived to be a fool-proof method. Obviously they failed to take cognizance of the fact that even if the Internal Revenue Bureau could decline to disclose the evidence in their possession to the O. P. A., it had been expressly provided by statute and regulation that all such information was to be made available to the United States Attorney and to others in the Department of Justice upon request. And even the agents called by appellants as their witnesses, told appellants' counsel that they would not be able to make disclosure of the matters disclosed to them, as one put it, "unless I was authorized to do so" [R. 449] and as the other testified, he could make disclosures to no one "except those authorized by the Treasury Department" [R. 452].

Then, it is important to note that none of the information possessed by the Internal Revenue Agents was ever furnished by them to the O. P. A.; all that actually was furnished, was supplied to the United States Attorney.

Moreover, even if appellants might have received assurances by Internal Revenue Agents as to non-disclosure to the O. P. A., no such assurances were or could have been given as to disclosures to the U. S. Attorney. Of course, it need hardly be argued in this respect also, that

no agent could bind the Treasury Department contrary to the latter's provisions or regulations or contrary to his superior's right to act within the scope of the latter's authority and later make disclosures. See *e.g., Gibson* case, *supra.*[32]

Appellants sought to use extra-legal methods to accomplish their continuing conspiracy to conceal from the O. P. A. their illegal charges and collections. Their scheme backfired, and now they seek to extricate themselves by pointing an accusing finger at the federal law enforcement agents, raising picayunish objections and making unsupported arguments. This court should not permit them to succeed in their illegal objectives through such tactics.

Point Five.

During the trial appellants for the first time sought to quash the indictment on the ground that it was obtained from the grand jury upon evidence which they asserted was improperly obtained—the statements to the Internal Revenue Agents discussed under the last point.

First of all, this motion to quash the indictment was not made in time. Here the indictment was returned on March 11, 1946 [R. 2], and the motion was first made at the trial, in June, 1946. And no defect appears on the face of the indictment.

Then, the evidence conclusively shows, without contradiction, that the three written admissions signed by the appellants were not used before the Grand Jury. [R. 385, 386, 387, 397, 453, *ff.*]. although permission to use in-

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[32]"* * * The deputy collector was incompetent to waive such right, if any, as the government had under the law to make use of the affidavit as evidence." (The *Gibson* case, *supra.*)

formation regarding appellants in the possession of the Internal Revenue Agents was sought and obtained from the Commissioner of Internal Revenue prior to the return of the indictments. Despite the categorical denial in this respect (A. B. 58) by the only witness called to the stand by appellants in this connection, despite a total absence of any evidence to the contrary, and despite the fact that at the trial counsel for appellants agreed that without contrary evidence, such testimony had to be accepted (A. B. 58) and was accepted by appellants (A. B. 59 also R. 387), appellants now seek by innuendo and direct statements to cast doubt upon that testimony (A. B. 53).

To further bolster their position, appellants' counsel then points to his own unsupported arguments and assertions before the trial judge (A. B. 60-62) and indulges in wholly unwarranted assumptions as to what transpired before the grand jury (A. B. 60, 61, 62).

Here again, as in the preceding point, appellants are obviously seeking to shift the spotlight from their avowedly illegal operations and their brazen scheme to undermine the laws enacted by Congress; in their effort to escape, appellants not only seek to confuse this Court by specious and frivolous arguments, but also deliberately attack the credibility of uncontradicted, reputable witnesses by indulging in unwarranted innuendos, and in unsupported contentions.

Such clear attempts to further circumvent the law by offering unsupported contentions in order to extricate appellants from their present position, should be summarily rejected.

The attack upon the sufficiency of the indictment is plainly without merit, and warrants no further discussion.

Point Six.

An audit prepared by appellants' certified public accountant, constituting "an analysis of the overcharges received by appellants" (A. B. 64), and voluntarily sent by them to the Bureau of Internal Revenue in their effort to extricate themselves from their income tax difficulties, was received in evidence [Govt. Ex. 58; R. 407, *ff.*].

Appellants assert that "there was no evidence that either appellants William Shubin or Frederick Shubin had authorized "delivery or disclosure of the audit to the Internal Revenue Agents, and that neither of them were present when their tax counsel delivered it" (A. B. 64).

The spuriousness of this contention is self-evident. The audit [R. 408, *ff.*] was prepared at the behest of all of the appellants [R. 415, 404, 408, *ff.*] for the express purpose of delivering it to the Internal Revenue Agents [R. 415-416], and "their tax counsel" delivered it (A. B. 64), manifestly as their agent. Moreover, Kissel was present, and participated in the delivery as agent for the other appellants [R. 404, ff.].[33]

The further contention that the audit was a privileged communication between attorney and client (A. B. 64), is likewise frivolous. Even if it had been such, and we deny that it was, the delivery of the audit to a third party —the Internal Revenue Agent—would have dissipated its privileged status. Plainly here again appellants are grasping at every straw to avoid the consequences of their gross violations.

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[33]Power of attorney was given to their counsel by appellants [R. 483].

Point Seven.

a.

Appellants assert that "statements of a conspirator not made in furtherance of the conspiracy are insufficient proof standing alone" (A. B. 67). This assertion is meaningless.

Possibly appellants meant to say that statements of one conspirator, when recitative of the past events which are charged as the conspiracy and constituting admissions, are not binding upon any of the co-conspirators except the one making them or in whose presence they are made. If that was appellant's intention, their position nevertheless is untenable.

First of all, the statements made by appellants to the Internal Revenue Agents were in part in furtherance of their conspiracy, in that they constituted a wilful continuance of appellants' scheme and attempt to falsify their records and conceal from the O. P. A. the fact of their illegal overcharges. These statements were made in July and August, 1945 [R. 473, *ff.*], and the conspiracy alleged in the indictment was charged as continuing to the date of the indictment, March 11, 1946 [R. 2, *ff.*].

All of appellants' actions and statements *vis-a-vis* the Bureau of Internal Revenue—their attempts to declare their full income without disclosures to O. P. A., their letters, statements and audit, their attorneys' representations orally and in writing—were in continuing concealment of their illegal collections and actually perpetrated their falsification of their books and records as to their true receipts from their meat sales. All their actions and statements with respect to the Bureau of Internal Revenue

were, consequently, in furtherance of their conspiracy and a continuance of it. Their individual statements to the agents were, therefore, proper evidence against all of the appellants, not merely against the one who made them.

Further, however, are the facts, not mentioned by appellants to this Court, that *each* of the appellants made a substantially similar statement to the Internal Revenue Agents (*supra,* see also R. 437, *ff.*), that all three filed the partnership return disclosing the collection of $141,125, that each appellant admitted this sum to have been composed of overceiling charges in the sale of meat (*supra,* pp. 15 *ff*), that all of the appellants were represented by the same tax counsel and the same attorney at the trial, and that all three appellants were admittedly partners, beknowingly and by prearrangement sharing all profits, legal and illegal (*supra,* pp. 17 *ff*).

Then, in addition, appellants have failed to apprise this Court of the fact that the statements made by each of the appellants to the agents were offered in evidence only as to the particular appellants *making them* [R. 383].

Moreover, all this evidence plainly disclosed a common scheme or plan to conceal true income and collections, and proof of that in any respect would be admissible to prove the offense charged in the indictment.

See, *e. g.:*

United States v. Fuffanelli, 131 F. (2d) 890 (C. C. A. 7), cert. den. 318 U. S. 772;

Weathers v. United States, 126 F. (2d) 118 (C. C. A. 5), cert. den. 316 U. S. 681;

United States v. Cohn, 145 F. (2d) 82 (C. C. A. 2), cert. den. 323 U. S. 799;

Bracey v. United States, 142 F. (2d) 85 (App. D. C.), cert. den. 322 U. S. 762;

United States v. Bradley, 152 F. (2d) 425 (C. C. A. 3);

Banning v. United States, 130 F. (2d) 330 (C. C. A. 6), cert. den. 317 U. S. 695;

United States v. Harrison, 121 F. (2d) 930 (C. C. A. 3), cert. den. 314 U. S. 661;

Witters v. United States, 106 F. (2d) 837 (App. D. C.);

Gianotos v. United States, 104 F. (2d) 929 (C. C. A. 9);

United States v. Sebo, 101 F. (2d) 889 (C. C. A. 7);

Cook v. United States, 28 F. (2d) 730 (C. C. A. 8);

Breese v. United States, 203 Fed. 824.

For all of these reasons, the admission of the testimony in question was clearly warranted.

b.

Appellants are plainly wrong when they assert (A. B. 69) that the testimony of the meat purchasers "shows no conspiracy among the appellants." We submit that the testimony of the three purchaser witnesses (*supra,* pp. 7 *ff*), without more, is sufficient to support the verdict of guilty as to each as to the conspiracy. That testimony discloses not only systematic collections of overceiling charges by appellants, but also a planned procedure and uniform practice in computing the overceiling sums, receiving that money in secret, and deliberate recordation of false sums—the legal price—on the face of the invoices given to the customers, as well as at least one other out-

rageous instance of falsification of other transactions (R. 111, *ff.*). Upon such testimony, together with the invoices introduced in evidence, and the permissible inferences which could reasonably be drawn from them, the jury obviously was warranted in predicating a verdict of guilty as to each of the appellants upon the conspiracy count (count 1) of the indictment.

Appellants, deliberate, scheming violators of the Emergency Price Control Act and the conspiracy statute, having illegally acquired $141,125 in black market collections in the sale of meat, having deliberately falsified their records as to such collections, having manipulated their books so as to conceal from the O. P. A. their true workings, and having worked out a further method for concealing the truth from the O. P. A. while protecting themselves from effects of originally understating their income for federal income tax purposes, now seek to escape the consequences of their activities by clutching at straws, overstating facts helpful to their objective, understating the facts demonstrative of their culpability, exaggerating the effect of almost every word and action of the trial judge, government counsel, and government law enforcement bureaus, and trying to obtain from this Court a reweighing of testimony, a reconsideration of credibility of witnesses, a reexamination of all facts and permissive inferences.

Having offered not one word of contradiction to the overwhelming evidence of their open disregard of, and contempt for the law, appellants seek reversal of their judgments upon flimsy, untenable grounds.

All of the appellants were found guilty of conspiracy. Appellants William Shubin and Kissel also were found

guilty of specific overceiling sales and false entries, while Frederick Shubin also was found guilty of false entries. Upon the testimony and record evidence before it, as well as appellants' individual statements as to their participation in the black market operations, these verdicts of the jury were eminently correct.

Conclusion.

No reversible error was committed by the trial judge. The appellants were given a fair trial. The verdicts are supported by the evidence. The sentences are moderate and clearly justified under the circumstances. The judgments should be affirmed.

Respectfully submitted,

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Attorneys for the Appellee.

APPENDIX

Maximum Price Regulations Nos. 148, 169 and 239 are price regulations issued pursuant to the Emergency Price Control Act of 1942.

Maximum Price Regulation No. 148 deals with dressed hogs and wholesale pork cuts. Maximum Price Regulation No. 169 deals with beef and veal carcasses and wholesale cuts. Maximum Price Regulation No. 239 deals with lamb and mutton carcasses and wholesale cuts.

Revised Maximum Price Regulation No. 169 in part provides:

> "Section 1364.406 Evasion. (a) The price limitations set forth in this Revised Maximum Price Regulation No. 169, shall not be evaded, either by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to beef or veal, separately or in conjunction with any other commodity or service, or by way of any commission, service, transportation, wrapping, packaging or other charge or discount premium or other privilege, or by tying agreement or other trade understanding, or by changing the selection of, grading, or the style of dressing, cutting, trimming, cooking or otherwise processing, or the canning, wrapping or packaging of beef or veal or otherwise: * * *"

Section 1364.407 Records and reports. * * *

> "(a) Every person making a sale and every person in the course of trade or business making a purchase of any beef carcass, beef wholesale cut, veal carcass or veal wholesale cut or other meat item subject to this revised regulation, shall make and preserve for inspection by the Office of Price Administration for

so long as the Emergency Price Control Act of 1942, as amended, remains in effect, complete and accurate records of each such sale or purchase, showing the date thereof, the name and address of the buyer and seller, the quantity, type of cut or item, grade or grades and the weight of all beef carcasses, beef wholesale cuts, veal carcasses and veal wholesale cuts or other meat items subject to this revised regulation sold or purchased and the price charged or received or paid therefor. * * *"

"Section 1364.401. Prohibition against selling beef and veal carcasses and whole cuts at prices above the maximum.—(a) Beef carcasses and wholesale cuts. On and after December 16, 1942, regardless of any contract, agreement, or other obligation no person shall sell or deliver any beef carcass or beef wholesale cut, and no person shall buy or receive [33] any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by Section 1364.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing. * * *"

There are in effect substantially similar provisions in Revised Maximum Price Regulations 148 as to pork, and 239 as to lamb, except that under Revised Maximum Price Regulation 148 there is no evasion provision such as above, and the record keeping provision is in different terms. The substance of the regulation is that certain records must be kept including such as are involved in this case and that they must be truthful and cannot be wilfully made false.